IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CP 175/99

670

[redacted]

BETWEEN **TANIA BREITMEYER**

Plaintiff

AND **THE CHRISTCHURCH PRESS COMPANY LTD**

First Defendant

AND **THE ATTORNEY-GENERAL**

Second Defendant

Date of Hearing: 5 April 2000

Judgment Released: 30/6/00

Counsel: C J O'Neill for Plaintiff
J B Stevenson for First Defendant
H Rennie QC for Second Defendant

JUDGMENT OF MASTER VENNING
On Defendants' Application For Summary Judgment

Solicitors:
Glover Sewell, Christchurch for Plaintiff
(Counsel – C J O'Neill, Christchurch)
Atkinson Butterworth, Auckland for First Defendant
(Counsel – J B Stevenson, Wellington)
Crown Law, Wellington for Second Defendant

APPLICATION

[1] The Plaintiff sues the Defendants in defamation. The alleged defamation arises out of an article published by the First Defendant on 28 July 1998 in *'The Christchurch Press'* newspaper. The article was published after the First Defendant had obtained information from the New Zealand Police concerning the Plaintiff.

[2] The Defendants say the Plaintiff can not succeed with her defamation claim and seek summary judgment against her.

BACKGROUND

[3] On 10 October 1997 the Plaintiff pleaded guilty to the sale of a class C controlled drug, namely cannabis, and to possession for supply of the same class of drug. The offending related to a period from 1 January 1997 to 24 June 1997.

[4] Subsequently, in March 1998, the Plaintiff stood trial in the High Court at Christchurch in relation to more serious charges. She was acquitted of those charges. Following her acquittal on the more serious charges the First Defendant ran an article on 10 March 1998 under the headline "woman bitter over drug trial ordeal".

[5] On 2 April 1998 the Plaintiff was sentenced to two years imprisonment on the two charges that she had pleaded guilty to. On 3 April 1998 *'The Christchurch Press'* published another article under the headline "8 jailed after raid", detailing the sentences handed down to the Plaintiff and seven others. The Plaintiff makes no complaint regarding the articles of 10 March and 3 April.

[6] The article of 10 March was written by Elinore Wellwood. After the publication of Ms Wellwood's article of 10 March, *'The Christchurch Press'* received representations from the Police to the effect the article portrayed the Plaintiff in too favourable a light, and that she was in fact a person involved in matters relating to drugs. The Police indicated they were willing to discuss with the *'The Christchurch Press'* matters relating to operation "Comalco" which had led to the arrest and conviction of the Plaintiff and others. A discussion between Mr John Henzell, a court reporter, and Det Snr Sgt Greg Williams followed during July;

which in turn led to the article published by *'The Christchurch Press'* on 28 July 1998 under the heading "Softly, softly approach nets police big gang drugs bust". It is that article which the Plaintiff alleges has defamed her in a number of ways.

[7] The Plaintiff complains of the following passages from the article:

> "We quickly established that there were three independent syndicates operating in the Black Power set up and dealing in drugs."
>
> "A third was organised by Tania Breitmeyer, a 23 year old beneficiary who had somehow managed to accumulate a Harley Davidson motor cycle and five cars."
>
> "In some ways they were competing with each other and had sophisticated means."
>
> Particularly the Breitmeyer one that was quite structured in what they were doing. They would rent a property, put someone in there as a shopkeeper, and have runners delivering cannabis foils and picking up cash."
>
> "At one time the group was running nine shops. They were selling to anybody, including school kids, and they were turning over $3,000 - $5,000 per day."
>
> "At one stage there were more than 50 arrests and a resulting string of trials. Altogether, there were 45 convictions. Breitmeyer, who had just given birth to a baby, was sentenced to two years in jail in April."
>
> "Senior Sergeant Williams said that for devoting a core of 15 Police staff to Operation Comalco for three months, Police had been able to strike a significant blow to Black Power operations in Christchurch."
>
> "Stage 4 of Operation Comalco is still underway – seizing dealer's assets under proceeds of crime legislation ... They (the Police) were seeking Breitmeyer's Harley Davidson and her bevy of cars."
>
> "'It's all about money isn't it?' he said ... 'They don't really give a stuff about prison, but if you take assets and their bikes off them it really hurts.'"

[8] Following her release from prison the Plaintiff commenced these defamation proceedings against the First and Second Defendants. The proceedings were commenced in the District Court in September 1999. By consent the proceedings were transferred to this Court on 9 November 1999. Both Defendants have now brought applications for summary judgment.

BASIS OF DEFENDANTS' APPLICATIONS

[9] The First Defendant's application for summary judgment is brought on the ground that it is entitled to rely upon the defence of statutory qualified privilege.

[10] The Second Defendant applies for summary judgment on the ground that the cause of action pleaded against it can not succeed, and also upon the grounds contained in the affidavit of Thomas John Fitzgerald, a detective of Christchurch. I observe that the application ought to have set out the specific grounds, rather than referring generally to the affidavit of Det Fitzgerald. However, Mr Rennie made it clear during the course of submissions that the basis of the application is:

- The statement of claim does not disclose a cause of action against the Second Defendant;
- If a cause of action is disclosed against the Second Defendant, the claim can not succeed on the basis of the allegations in the statement of claim;
- If a cause of action is disclosed on the pleadings the Second Defendant can rely upon the common law defences of absolute and qualified privilege, truth and honest opinion.

PRINCIPLES

[11] As they bring the applications for summary judgment the Defendants must satisfy the Court that the Plaintiff's cause of action can not succeed. In the present case there is only one cause of action, that in defamation. The onus is upon the Defendants to satisfy the Court the Plaintiff has no arguable answer to the defences raised: *Ferrymead Tavern Ltd & Ors v Christchurch Press Co Ltd* (Master Venning, Christchurch, CP 184/98, 11/8/99).

THE FIRST DEFENDANT'S APPLICATION

[12] As noted, the First Defendant relies upon the defence of statutory qualified privilege. The relevant sections of the Defamation Act 1992 are as follows:

> "16 QUALIFIED PRIVILEGE--
> (1) Subject to sections 17 and 19 of this Act, the matters specified in Part I of the First Schedule to this Act are protected by qualified privilege.

(2) Subject to sections 17 to 19 of this Act, the publication of a report or other matter specified in Part II of the First Schedule to this Act is protected by qualified privilege.

(3) Nothing in this section limits any other rule of law relating to qualified privilege

17 QUALIFIED PRIVILEGE NOT TO APPLY WHERE PUBLICATION PROHIBITED—
Nothing in subsection (1) or subsection (2) of section 16 of this Act protects the publication of any report or other matter where the publication of that report or matter is prohibited by law, or by a lawful order, in New Zealand or in a territory in which the subject-matter of the report or matter arose.

18 RESTRICTIONS ON QUALIFIED PRIVILEGE IN RELATION TO PART II OF FIRST SCHEDULE--

(1) Nothing in section 16(2) of this Act protects the publication of a report or other matter specified in Part II of the First Schedule to this Act unless, at the time of that publication, the report or matter is a matter of public interest in any place in which that publication occurs.

(2) In any proceedings for defamation in respect of the publication in any newspaper, or as part of a programme or service provided by a broadcaster, of a report or other matter specified in Part II of the First Schedule to this Act, a defence of qualified privilege under section 16(2) of this Act shall fail if the plaintiff alleges and proves--

(a) That the plaintiff requested the defendant to publish, in the manner in which the original publication was made, a reasonable letter or statement by way of explanation or contradiction; and

(b) That the defendant has refused or failed to comply with that request, or has complied with that request in a manner that, having regard to all the circumstances, is not adequate or not reasonable.

19 REBUTTAL OF QUALIFIED PRIVILEGE--

(1) In any proceedings for defamation, a defence of qualified privilege shall fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.

(2) Subject to subsection (1) of this section, a defence of qualified privilege shall not fail because the defendant was motivated by malice.

...

FIRST SCHEDULE

...

PART I

...

6. The publication of a fair and accurate report of the proceedings of any Court in New Zealand (whether those proceedings are preliminary, interlocutory, or final, and whether in open Court or not), or of the result of those proceedings.

...

PART II

...

15. A copy or a fair and accurate report or summary of a statement, notice, or other matter issued for the information of the public by or on behalf of the Government or any department or departmental officer, or any local authority or officer of the authority."

[13] Section 17 does not apply. There was no prohibition on the matters reported in the article itself.

[14] Section 19 is also inapplicable. The defence of qualified privilege will fail if the plaintiff establishes ill will. However, if a plaintiff wishes to answer a claim to qualified privilege on the basis of ill will, s41 of the Defamation Act requires a notice to be served within ten working days after the statement of defence: s41(3). No such notice has been served and I record that in submissions Mr O'Neill confirmed there was no intention to file a s41 notice. Section 19 is irrelevant for present purposes.

[15] The next matter to consider is Mr Stevenson's suggestion that the First Defendant was entitled to rely on the privilege under the First Schedule, Part I, note 6 insofar as the article was a report of a Court proceeding.

[16] However, the article of 28 July 1998 is not a report of a Court proceeding as such. It is a leading article on the involvement of gangs in the drug scene in Christchurch and a review of a successful Police operation that led to the prosecution and conviction of the Plaintiff and others on drug charges. It is clearly not the publication of a report of the proceedings of the Court. The privilege under the First Schedule Part I, note 6 has no application.

[17] That leaves the qualified privilege defence under the First Schedule Part II. That defence applies subject to the restrictions in s18. The effect of s18(2) is that in any proceedings for defamation in respect of the publication in a newspaper, such as

'The Christchurch Press' a defence of qualified privilege shall fail if the plaintiff alleges and proves:

> "(a) That the plaintiff requested the defendant to publish, in the manner in which the original publication was made, a reasonable letter or statement by way of explanation or contradiction; and
>
> (b) That the defendant has refused or failed to comply with that request, or has complied with that request in a manner that, having regard to all the circumstances, is not adequate or not reasonable."

[18] At paragraph 16 of the statement of claim the Plaintiff alleges:

> "By letter dated 30 July 1998 the plaintiff invited the first defendant to retract the statements made about the plaintiff and to apologise, but the first defendant has refused to apologise or withdraw the statements made."

[19] Mr O'Neill submitted that the letter of 30 July 1998 was a letter in terms of s16(2) of the Act. The Plaintiff did not put the letter in evidence. I have to consider the matter on the pleading. In answer Mr Stevenson noted that this ground was not raised in the Plaintiff's notice of opposition and that a request for a retraction and an apology is, in any event, not a request for publication of a letter or statement by way of explanation or contradiction.

[20] I agree with Mr Stevenson's submission. Section 18(2) provides a process by which a person allegedly defamed by a newspaper may request the paper to publish their reasonable response or their side of the story so that both points of view are before the members of the public. That is something quite different from requiring, as the statement of claim alleges, a complete retraction and apology. Section 18(2) does not apply to bar the First Defendant's claim to qualified privilege in the present case.

[21] The issue then is whether the First Defendant newspaper is entitled to rely upon qualified privilege.

[22] A similar defence was considered and accepted by the Court in the *Ferrymead Tavern Ltd* (supra) case. As noted in that case, to succeed with its defence the defendant must establish that the article was:

(a) A fair and accurate report or summary of a statement, notice or other matter, issued for the information of the public by or on behalf of the Police; and

(b) That at the time of the publication the report or matter was a matter of public interest in any place at which that publication occurred.

[23] Determination of the first issue requires consideration, inter alia, of whether the statement was a statement, notice or other matter issued by or on behalf of the Police - ie was it of a sufficiently official nature (the status requirement).

[24] As noted by Prof Burrows in *'News Media Law in New Zealand'* (3rd edn):

> "There is no requirement that the initial statement be issued in writing as a press release; an oral statement would seem to be covered as well. But it appears that the statement must legitimately be able to be described as an 'official release'. Such releases must be distinguished from 'mere interesting gossip supplied to journalists by the publicity officer of a minister for the purpose of keeping his minister and department prominently in the public eye.'" P79

See also *ex p Kempley* (18/1/44) which although unreported is referred to in *Forster v Watson* (1944) 44 NSWSR 399.

[25] In the *Ferrymead Tavern* case the information was released by the Senior Sergeant on duty as the Communications Senior in the communications room of the Police station. The information was topical. The press inquiry was made towards the end of a weekend concerning incidents the Police were involved in over the weekend. The report was published on the Monday. The press report did not contain any comment. It simply reported the statement issued by the Police.

[26] The material in the article in this case, and the article itself, is of a very different nature. Significantly, the article appeared almost five months after the trial in early March 1998 and almost four months after the Plaintiff had been sentenced on the charges she pleaded to. Further, it appears clear from Mr Pankhurst's evidence that the Police wanted to maintain communications with *'The Christchurch Press'* about the Plaintiff and her associates' activities. It is at least open to inference that the Police wanted to respond to the sympathetic report of 10 March, and used their relationship with *'The Christchurch Press'* for that purpose.

[27] While the article was undoubtedly written by Mr Henzell, based in part upon information he obtained from Det Snr Sgt Greg Williams, the delay between the relevant events and the article together with the nature of the Police invitation to

'The Christchurch Press' to maintain contact regarding these matters are such that it is arguable the statements made by Det Snr Sgt Greg Williams lack the necessary status for the article to be described as a statement issued for the information of the public by or on behalf of the Police.

[28] The fact that the base information contained in the article was supplied by an official is not itself sufficient. The status of the body issuing the report is not in itself conclusive: *Perera v Peiris* [1949] AC 1 (PC).

[29] The tenor and general content of the article in this case also suggest that it goes rather further than simply a fair and accurate report or summary of a statement issued for the information of the public by the Police. It is sufficient to refer to the introductory comments of the article by way of example. After the heading the following appears:

> "Staff reporters outline how police hobbled Black Power's burgeoning Christchurch drug trade.
>
> Operation Comalco was born of bloodshed. Black Power's sudden expansion of its drug-dealing work into Cashel Street, a stone's throw from a rival gang's headquarters, was part of the reason for a sudden and violent counterattack that left three Black Power men seriously injured. Violent retribution seemed inevitable."

[30] For those reasons I find the First Defendant is unable to satisfy the Court that the statement in this case is of a sufficiently official nature to satisfy the status requirement. As the First Defendant can not satisfy this requirement it is unable to satisfy the Court it has an unanswerable defence based upon statutory qualified privilege.

[31] The First Defendant's application for summary judgment must be declined.

SECOND DEFENDANT'S APPLICATION FOR SUMMARY JUDGMENT

[32] The Second Defendant first submits the Plaintiff's claim simply fails to disclose a cause of action against the Second Defendant. This matter was expressly raised in the statement of defence where the Second Defendant says:

> "Paragraph 8 of the statement of claim alleges defamation of the Plaintiff by particulars which are originated by and published in the statement of claim by her and does not disclose a cause of action against the Attorney-General as Second Defendant. If the intention of the pleading is to allege

> that such statements as were made and published by police officers set out in paragraph 5 were defamatory of the plaintiff in that they had any of the meanings alleged in paragraph 6 of the statement of claim then such allegations would when pleaded be denied."

[33] Despite that pleading the Plaintiff has not amended the statement of claim.

[34] Mr Rennie's short point was that the Plaintiff's pleading against the Second Defendant was simply defective. However, whilst the pleading is certainly not felicitous, and the pleading at paragraph 8 is curious in that it alleges the particulars supplied by the Plaintiff in paragraphs 6.1 to 6.14 are defamatory (and thus appears on its face to be a complaint about the Plaintiff's own pleading), I am unable to accept that the pleading is so deficient that the Second Defendant ought to be entitled to summary judgment on this rather technical ground.

[35] The statement of claim does identify the 28 July 1998 article. It pleads at paragraph 5 that reference was made (in the article) to the Plaintiff and her activities "as claimed by a police spokesman". Particulars of the article complained of, including comments attributed to the Police spokesman are then set out in the balance of paragraph 5. Paragraph 6 pleads the article was defamatory of the Plaintiff. Thus there is a complaint that the article was defamatory, together with a pleading linking the Second Defendant to the content of the article. The Second Defendant can not succeed on this first ground.

[36] Next Mr Rennie submitted that even if a cause of action could be distilled from the pleadings it could not possibly succeed. In support of this submission he referred to an analysis of the 14 meanings alleged by the Plaintiff in the particulars of paragraph 6. He submitted that the analysis of those 14 meanings showed that the words complained of simply failed to disclose a cause of action against the Second Defendant.

[37] Mr Rennie submitted that only paragraphs 6.1, 6.2, 6.3, 6.6, 6.9 and 6.14 related to words set out in paragraph 5 from the First Defendant's article as published. Indeed, he submitted that with the exception of the meaning alleged at paragraphs 6.3 and 6.14 there was uncertainty as to whether the words could be so identified. Next, he submitted that in only two cases, 6.6 and 6.14, were the words

published by the Police. Finally he submitted that in only two instances did the meanings alleged arise from words in the article (6.3 and 6.9).

[38] The criticism of the pleading is justified. A number of examples will suffice. It is apparent that a number of the comments complained of can not be attributed to the New Zealand Police. For example, the complaint that in its ordinary meaning the article meant and was intended to mean the Plaintiff owned a Harley Davidson motorcycle purchased from the proceeds of drug sales comes, according to Mr Henzell's evidence, from the sentencing report earlier published by *'The Christchurch Press'* on 3 April 1998. That was a statement made by the Crown Prosecutor, not the Police.

[39] Again strictly, the allegation at paragraph 6.5 that in its ordinary meaning the article meant and was intended to mean that the Plaintiff used 15 and 16 year old children to sell drugs on her behalf does not refer back to the particulars of the article referred to in paragraph 5 of the statement of claim. There is no reference in paragraph 5 to the use of school children. To that extent there is force in Mr Rennie's criticism of the pleading. However, I note that the article itself does refer to the Breitmeyer and Kairau syndicates using 15 and 16 year old girls.

[40] Mr Rennie also criticised paragraphs 6.7 and 6.8 of the particulars on the basis they were not complained of in paragraph 5 of the statement of claim, were not published by the Police and the meaning alleged could not be found in pararaph 5. Paragraphs 6.7 and 6.8 allege:

> "6.7 In its ordinary meaning the article meant and was intended to mean Ms Breitmeyer was a member of the Black Power gang.
>
> 6.8 In its ordinary meaning the article meant and was intended to mean that Ms Breitmeyer was linked to the Kairau gang and its operations in this city."

Again strictly Mr Rennie is correct. However, paragraph 5 of the statement of claim refers to the following quotation from the Detective:

> "We quickly established that there were three independent syndicates operating in the Black Power set up and dealing in drugs."

This, followed by the reference to the third of the syndicates being organised by the Plaintiff, associates the Plaintiff with the Black Power organisation, and necessarily associates the Plaintiff with the Black Power gang.

[41] The article itself goes on to refer to a quotation from the Defendant:

> "The way the gangs operate is that patched members will distance themselves from selling cannabis and use prospects or kids. The Breitmeyer and Kairau syndicates were using 15 and 16 year old girls. ..."

To that extent the Plaintiff was associated with Mr Kairau.

[42] I accept Mr Rennie's general point that the claim as it presently stands is poorly pleaded. However, this is not an application to strike out part(s) of the claim. It is an application for summary judgment. To succeed, the Second Defendant must satisfy the Court that the Plaintiff's cause of action in defamation can not succeed.

[43] Despite Mr Rennie's analysis of the pleading, and without commenting on the merits of the Plaintiff's claim generally, even Mr Rennie conceded that there was one statement that was potentially defamatory. Unless there is an absolute defence to that statement the application for summary judgment must be declined.

[44] In respect to that it is sufficient to the refer to the allegation at paragraph 6.9 that:

> "In its ordinary meaning the article meant and was intended to mean that Ms Breitmeyer sold cannabis to school children among other persons."

Mr Rennie conceded that statement could potentially be defamatory.

[45] The statement refers back to the allegation that:

> "At one time the group was running nine shops. They were selling to anybody, including school kids, and they were turning over $3,000 to $4,000 per day."

Although Mr Rennie submitted the words were not published by the Police, it appears from the article that the reporter has quoted from Det Snr Sgt Williams as the source for this paragraph. Thus, subject to any positive defences, this allegation could stand.

Truth

[46] Mr Rennie submitted that the defence of truth could apply to four of the statements complained of, including paragraph 6.9. As acknowledged by Mr Rennie, the allegation at paragraph 6.9 that the Plaintiff sold drugs to school children is potentially defamatory. Detective Fitzgerald says of that statement in his evidence:

> "The Plaintiff was not charged with selling cannabis to minors but the surveillance confirmed that school children were customers of the house at 346 Madras Street and while the search warrant was being executed by Police, school children arrived and produced cash to purchase drugs."

[47] The evidence currently before the Court, however, does not disclose that the Defendant was present at 346 Madras Street when the sales to school children took place, nor indeed that she took part in those sales. The defence of truth may not apply to this allegation. It can not be said on the state of the evidence currently before the Court that the statement is true or not materially different from the truth so that the Defendant can establish an absolute defence. It is a matter which requires further evidence.

[48] Therefore, even accepting that the defence of truth could apply to paragraphs 6.3, 6.6 and 6.10, does not assist the Second Defendant as arguably on the information currently before the Court it may not apply to the complaint at paragraph 6.9.

Honest Opinion

[49] While the Second Defendant raises the defence of honest opinion, that is in relation to the allegation at 6.14 rather than 6.9. It is unnecessary to consider it further.

[50] That leaves the defences of absolute and qualified privilege.

Absolute Privilege

[51] Absolute privilege could apply to comments made by the Police during the course of the trial or judicial proceedings, but on the face of it a number of the comments attributed to the Detective were made outside the legal proceedings. For the reasons expressed above absolute privilege can not apply in this case given the circumstances of this article.

Qualified Privilege

[52] The Second Defendant can not rely upon the defence of statutory qualified privilege. She has to rely upon common law privilege. As noted by the Court of Appeal in *Lange v Atkinson* (CA 52/97, 21/6/00) the test is to be found in *Adam v Ward* [1917] AC 309 at 334:

> "A privileged occasion is ... an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it." Per Lord Atkinson

[53] For the defence to apply the Second Defendant must satisfy the duty/interest test.

[54] As to the duty, Burrows *'News Media Law in New Zealand'* (3rd edn) notes:

> "Publications in the general news media are seldom covered by this kind of privilege. It is superficially attractive to say that provided a matter is one of the public interest, then the media have a 'duty' to communicate it to readers, who have a corresponding 'interest' to receive it. Such a plea has indeed succeeded in cases involving media reports of official proceedings and statements. Thus, although they are now covered by statute, newspaper reports of court cases and parliamentary debates always had a qualified privilege at common law apparently for the reason that the newspaper had a 'duty' to convey them to the public. ... But the courts are most unwilling to find that such a privilege protects the news media in what might be described as 'investigative reporting' and such claims are normally rejected – for either of the reasons that the public have no interest beyond idle curiosity in knowing the information, or that the media have no duty to purvey rumour and inaccurate information."

[55] In the present case there are aspects of the article that could be described as investigative reporting. For present purposes, and for the reasons identified at

paragraphs 26 to 29, the position is not so clear cut that the Court can be satisfied at this time that the defence of common law qualified privilege applies. Nothing in the recent decision of the Court of Appeal in *Lange v Atkinson* (supra) affects that.

[56] In summary, while a number of the defamatory meanings complained of by the Plaintiff are either not capable of being defamatory, were apparently not issued by the Second Defendant, or otherwise are true or not materially different from the truth, the allegation that in its ordinary meaning the article meant the Plaintiff sold cannabis to school children is potentially defamatory of the Plaintiff, and at the present time on the information before the Court the Second Defendant can not satisfy the Court that it has an absolute defence to that allegation.

[57] The Second Defendant's application for summary judgment must be declined also.

[58] Costs on the applications are reserved.

TIMETABLE

[59] The following timetable directions apply:

(a) Lists of documents to be filed and served by 21 July.

(b) Inspection to be completed by 11 August.

(c) Any further interlocutory applications to be filed and served by 1 September.

(d) The proceeding will be reviewed at a telephone conference before me ***at 9.00am on 7 September***.

MASTER VENNING